IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITIONS NO.84 AND 88 OF 2002.

WRIT PETITION NO. 84 OF 2002.

Shri Luizinho Joaquim Faleiro,
r/o "Luchel", Caminho de Monte,
Borda, Margao, Goa. ... Petitioner.

VERSUS

1. The State of Goa,
   through its Chief Secretary,
   having office at Secretariat,
   Panaji, Goa.

2. The Governor of Goa,
   Raj Bhavan, Goa, and

3. Shri Manohar Parrikar,
   Chief Minister,
   Govt. of Goa, Secretariat,
   Panaji, Goa. ... Respondents.

Shri V.B. Nadkarni, Senior Advocate with Shri Y.V. Nadkarni, Advocate for the Petitioner.

Shri A.N.S. Nadkarni, Advocate General with Shri P.A. Kamat & Shri H.D. Naik, Addl. Govt. Advocates for the Respondent No.1.

Shri R.N. Trivedi, Addl. Solicitor General with Shri Sandeep Agarwal, Advocate for the Respondent No.2.

Shri M.S. Usgaonkar, Senior Advocate with Shri V.P. Thali, Addl. Adv. General with Ms. G. Pednekar, Addl. Govt. Advocate for the Respondent No.3.

WRIT PETITION NO. 88 OF 2002.

1. Shri Jeetendra Deshprabhu,
   major of age, Member of
   Legislative Assembly, Pernem
   Constituency, r/o "Rauraje Palace",
   Pernem, Goa, and

2. Mr. Francisco Silveira,
   major of age, elected
   from St. Andre Constituency,
   r/o Dandi, Agassaim, Ilhas,
   Goa. ... Petitioners.

VERSUS

1. The Governor of Goa,
   Raj Bhavan, Dona Paula, Goa.

2. The Government of Goa,
   through its Chief Secretary,
   having his office at Secretariat,
   Panaji, Goa.

3. Shri Manohar Parrikar,
   The Chief Minister of Goa,
   having his office at Secretariat,
   Panaji, Goa.

4. Shri Ravi Naik,
   Deputy Chief Minister,
   having his office at Secretariat,
   Panaji, Goa.

5. Shri Ramakant Khalap,
   Minister for Water Resources
   and Information Technology,
   having his office at Secretariat,
   Panaji, Goa.

6. Shri Digambar Kamat,
   Minister for Power and
   Urban Development,
   having his office at
   Secretariat, Panaji, Goa.

7. Shri Haji Shaikh Hassan
   Haroon, Minister for Industries
   and Craftsman Training, having
   his office at Secretariat,
   Panaji, Goa.

8. Shri Prakash Velip,
   Minister for Cooperation
   & Fisheries, having his
   Office at Secretariat,
   Panaji, Goa.

9. Shri Pandurang Raut,
   Minister for Transport,
   Printing & Stationery,
   having his office at
   Secretariat, Panaji, Goa.

10. Dr. Suresh Amonkar,
    Minister for Health &
    Provedoria, having his
    office at Secretariat,
    Panaji, Goa.

11. Shri Sanjay Bandekar,
    Minister for Civil Supplies,

Sports, Youth Affairs,
Information & Publicity,
having his office at
Secretariat, Panaji, Goa.

12. Shri Prakash Phadte,
Minister for Town & Country
Planning & Forest, having
his office at Secretariat,
Panaji, Goa.

13. Shri Manohar Babu Azgaonkar,
Minister for Panchayat,
Raj & Housing, having his
office at Secretariat,
Panaji, Goa.

14. Shri Filipe Neri Rodrigues,
Minister for Tourism, R.D.A. &
Weights & Measures,
since resigned, major,
having his office at
Secretariat, Panaji, Goa.

15. Shri Jose Philip D'Souza,
Minister for Revenue &
River Navigation, having
his office at Secretariat,
Panaji, Goa; and

16. Shri Ramarao G. Dessai,
Minister for Agriculture,
Art & Culture, having his
office at Secretariat,
Panaji, Goa. ... Respondents.

Shri S.K. Kakodkar, Senior Advocate with Shri J.J. D'Souza, Advocate for the Petitioners.

Shri D.K. Trivedi, Addl. Solicitor General with Shri Sandeep Agarwal, Advocate for the Respondent No.1.

Shri A.N.S. Nadkarni, Advocate General with Shri P.A. Kamat & Shri H.D. Naik, Addl. Govt. Advocates for the Respondent No.2.

Shri M.S. Usgaonkar, Senior Advocate with Shri V.P. Thali, Addl. Advocate General with Ms. G. Pednekar, Addl. Govt. Advocate for the Respondents No.3 to 8, 10 to 14 and 16.

Shri S.G. Bhobe, Advocate for the Respondents Nos.9 and 15 (Absent).

**CORAM: V. C. DAGA, J.**

DATE OF RESERVING THE JUDGMENT:
23rd July, 2002.

DATE OF PRONOUNCING THE JUDGMENT:
1st August, 2002.

J U D G M E N T:

These two Writ Petitions under Article 226 of the Constitution of India have been referred to me in view of the split judgment by the two learned Judges of the Goa Bench of this Court. While Justice A.S. Aguiar was of the view that these petitions ought to be allowed and Rule granted therein be made absolute, another learned Judge, Justice P.V. Hardas, took a view that these Writ Petitions ought to be dismissed and Rule granted therein be discharged. The Division Bench did not formulate points of difference and ordered that these petitions be placed before the Hon'ble Chief Justice for being referred to a third Judge. The learned Chief Justice was pleased to refer these petitions for my opinion as a third Judge under Clause 36 of the Letters Patent. That is how these petitions were placed before me for hearing and opinion.

**On maintainability of reference to a third Judge:**

2. At the first instance, when these petitions were placed on board for directions Shri S.G. Dessai, learned Senior Counsel, at the relevant time, appearing

for the petitioners in Writ Petition No.88/2002 has raised an objection to this reference being violative of Section 98(2) of Civil Procedure Code (C.P.C. for short). According to him, no point of law arose for consideration or at any rate, no point of law was framed or stated by the learned Judges of the Division Bench which expressed difference of opinions, inasmuch as the matter is referred to a third Judge without following the procedure of Section 98(2) C.P.C.; the reference to a third Judge is a nullity.

3. The learned Advocate General appearing for the State of Goa pointed out that Section 98(2) has no application to the facts of these cases and that the contention has no merit whatsoever and that the provision of Section 98(3) has obviously been overlooked by the learned counsel for the Petitioners. As per that sub-section nothing in Section 98 shall be deemed to alter or otherwise affect any provision of the Letters Patent of any High Court. Admittedly, this High Court has Letters Patent. The learned Advocate General pointed out that Clause 36 of the Letters Patent provides that in the event of difference of opinion between two Judges as to the decision on any point, the case shall be heard upon that point by one or more of the other Judges and the case must be decided on the majority of the opinion. He relied upon the judgment of the Apex Court in the case of **S.P.G.**

**Committee v. M.P. Dass Chela,** A.I.R. 1998 S.C., 1978, wherein the judgment of the High Court of Punjab and Haryana in Mahant Swaran Dass v. Shiromani Gurudwara Parbandhak Committee, Amritsar, A.I.R. 1981 Punjab and Haryana, 110 with other rulings taking the same view that the provisions of Section 98(2) C.P.C. are not applicable to High Courts which are governed by Letters Patent and the matter can be referred to a third Judge on a difference of opinion between the two Judges even on point of facts, has been approved.

4. In the above view of the matter, it is clear that the reference does not suffer from any legal or factual infirmity. All the questions and issues based on facts and law involved in the petitions are open for the opinion of the third Judge. In this backdrop, both petitions were heard on merits to render my opinion on the questions of fact and law both.

OUTLINE CHRONOLOGY.

5. Goa which was liberated on 19th December, 1961 along with Daman and Diu from 451 years of Portuguese Colonial Rule, became the 25th State of Indian Union when it was conferred Statehood on 30th May, 1987.

6. The State of Goa has a Legislative Assembly

with a strength of 40 elected members. The Governor is the Head of State and is advised by the Council of Ministers headed by the Chief Minister.

7. Goa, a tiny emerald land on the west coast of India, with its natural scenic beauty, abundant greenery, attractive beaches and temples and churches with distinctive style of architecture and above all, hospitable people with a rich culture milieu, has always been suffering from bad political weather. In the recent past, the evil of political defections has been a political phenomenon in Goa. The other disturbing picture of this phenomenon emerging on the screen of these petitions is multiple acts of defections by the same persons or set of persons; indifference on the part of the defectors to political proprieties, constituency preference or public opinion and the belief held by the people and expressed in the press that corruption and bribery were behind some of these defections. The frequent crossing of the floor and changing allegiance from one party to another by the legislators of the State appears to have damaged the political fabric of the State of Goa.

8. In order to appreciate the controversy, it would be necessary to state brief matrix of facts leading to the present petitions. Though the petitioners are

different but legal and factual challenges are identical. Hence no separate outline chronology giving rise to these two separate petitions is necessary.

9. The petitioners were the members of the Goa State Legislative Assembly which came to be dissolved by the impugned Order dated 27th February, 2002. The petitioner in Writ Petition No.84/2002 was the Leader of the Opposition in the House and was the Chief Minister for some time till 24th November, 1999. He was required to resign due to reduction in strength of his party Indian National Congress, on account of defection of 11 members of his party.

10. The challenge in the above two petitions is to two Orders, both dated 27th February, 2002 bearing Nos. G/2/2002/2881 and G/2/2002/2882 respectively; whereby the Governor of Goa dissolved the State Legislative Assembly with immediate effect and under second Notification ordered the Council of Ministers headed by the Chief Minister of Goa to continue to carry on functions as a Council of Ministers until its successor takes office under the Constitution. The Notification dated 27th February, 2002 dissolving the Legislative Assembly reads hereunder :-

" RAJ BHAVAN
ORDER
No. G/2/2002/2881

> In exercise of the powers conferred upon me under Article 174(2)(b) of the Constitution of India, and all other powers enabling me in that behalf, I, Mohd. Fazal, Governor of Goa, on the advice of the Council of Ministers, hereby dissolve the Legislative Assembly of Goa, with immediate effect.
>
> Dona Paula.
>
> Dated:27th February, 2002.(MOHD.FAZAL)
> Governor of Goa
>
> RAJ BHAVAN "

11. The petitioners challenge the aforesaid Order of the Governor dissolving the State Legislative Assembly under Article 174(2)(b) of the Constitution of India being unconstitutional, void and inter alia on the ground that the Chief Minister in order to avoid to face the vote of no-confidence which was imminent; opted for dissolution of the House on the aid and advice of the Chief Minister and his Council of Ministers; which was not likely to continue for want of majority. The said action in their opinion is contrary to the well settled principles governing dissolution of Legislative Assembly.

12. It is alleged that on 13th February, 2002 the House was summoned by the Governor for 13th March, 2002 for passing the Budget. The dissolution was ordered within less than two weeks prior to the said meeting, without taking into consideration the fact that the State would be thrown into a state of financial crisis if the Budget was not passed. The Governor did not even consider

the consequences of his dissolving the House prematurely. The act of dissolution was a mindless act without any concern for public welfare and meant only for satisfying objectives of the party in power in the State.

13. It is further alleged that subsequent to the Notification dated 13th February, 2002 convening the meeting of the Legislative Assembly for approving the Budget on 13th March, 2002, there was no change of circumstances in the following two weeks preceding decision to dissolve the Assembly on 27th February, 2002, warranting dissolution of the House. The Chief Minister being aware of the imminent loss of confidence in the House, resorted to subterfuge and persuaded the Governor to dissolve the House, on the alleged aid and advice of the Chief Minister alleged to be supported by the Council of Ministers. The dissolution of the House on the advice of the Chief Minister, who did not command stable majority, was an abuse of power on the part of the Governor.

14. It is further alleged that the Chief Minister reported at a Cabinet meeting on 27th February, 2002, scheduled at 10.30 a.m. discussed the issue of the State Assembly, despite the fact that the issue was not on the Agenda circulated to the Ministers and despite the fact that the Cabinet had not agreed to the dissolution, the

Chief Minister proceeded to meet the Governor at 11.15 a.m. on the same day and advised dissolution of the Legislative Assembly. The Chief Minister produced before the Governor the Cabinet advice for dissolution signed only by himself. The advice of the Chief Minister was not of the Council of Ministers but it was a decision taken by the Chief Minister unilaterally with mala fide intent of avoiding imminent fall of the Government which was clear from the newspaper articles appearing in the daily newspapers. The Governor has acted in undue haste without even seeking any information from the Council of Ministers or from the Leader of the Opposition. The Governor ought not to have agreed to the dissolution of the Legislative Assembly, since there were more than two years left for the expiry of the term of the House.

15. It is further alleged that the mala fides inherent in the advice of the Chief Minister percolated in the decision making process of the Governor as such the said decision stood vitiated, and that the Governor faulted in the discharge of his constitutional duty. The failure on the part of the Governor to explore the continuation of the Assembly for full term is a failure on the part of the Governor in protecting and upholding the Constitution.

16. On the aforesaid canvas of facts, the

petitioners are seeking a declaration that both the impugned orders of the Governor of Goa dated 27th February, 2002 be declared as unconstitutional, null and void and be set aside.

**Subsequent events:**

17. The respondent No.1 filed affidavit dated 10.7.02 affirmed by the Chief Secretary to the Government of Goa bringing on record subsequent events which have occurred during the pendency of these petitions. The said affidavit revealed that on 11.5.02 a Notification was issued by the Election Commission of India, declaring the general elections to the Legislative Assembly of the State of Goa to be held on 30th May, 2002 in pursuance of the election programme, notified by the Chief Election Commissioner of Goa. Accordingly on 30th May, 2002 the elections to the Assembly of the State of Goa were held and new Assembly was constituted under Notification dated 2.6.2002 a copy of which is produced on record showing details of 40 returned candidates of the Assembly of the State of Goa in which the names of the petitioners also figure. The text of the Notification is reproduced hereinbelow:-

"EXTRAORDINARY
GOVERNMENT OF GOA

DEPARTMENT OF ELECTIONS
Office of the Chief Electoral Officer
Notification

No.308/GOA-LA/2002:- Whereas, in pursuance of Notification No.58-2002/ELEC, issued by the Governor of Goa on 6th May, 2002, under sub-section (2) of Section 15 of the Representation of the People Act, 1951 (43 of 1951), a General Election has been held for the purpose of constituting a new Legislative Assembly for the State of Goa; and

Whereas, the results of the elections in all the Assembly Constituencies in the said General Election have been declared by the Returning Officers concerned;

Now, therefore, in pursuance of Section 73 of the Representation of the People Act, 1951 (43 of 1951), the Election Commission hereby notifies the names of the members elected for those constituencies, along with their party affiliation, if any, in the SCHEDULE enclosed to this notification.

By Order,
C.R. BRAHMAN,
Secretary to the
Election Commission of India.

SCHEDULE

| No. and Name of Assembly Constituency | Name of Elected Member | Party Affiliation (if any) |
|---|---|---|
| 2. Pernem | Deshprabhu Jitendra Raghuraj | Indian National Congress |
| 13. St. Andre | Silveira Francis Manuel | Indian National Congress |
| 32. Navelim | Faleiro | Indian |

Luizinho National Congress

By Order,
C.R. BRAHMAM,
Secretary to the
Election Commission of India"

18. It is further brought on record that on 3.6.2002 Respondent No.3 was sworn in as Chief Minister of Goa along with the other 12 Cabinet Ministers and the first session of the Assembly was held on 13.06.2002. In the said session business including presentation of the State budget was done on 15.6.2002, Vote on Account Bill was passed which was assented by the Government. The next session of the Assembly was being summoned to be held on 22nd July, 2002. The said affidavit was taken on record. The petitioners did not file any counter affidavits. The facts brought on record by way of subsequent events are thus not in dispute.

**Rival submissions:**

19. S/Shri S.K. Kakodkar, V.B. Nadkarni, learned Senior Counsel addressed this Court in support of the petitioners. Learned Additional Solicitor General of India, Shri R.N. Trivedi, learned Advocate General of Goa, Shri A.N.S. Nadkarni, Shri M.S. Usgaonkar, Senior Counsel appearing for the respondent No.3 sought to support the impugned action of the Governor.

**Submission of Petitioners:**

20. The petitioners contend that the impugned order of the Governor dissolving the Legislative Assembly on the aid and advice of the Council of Ministers does not state that it has been made in the exercise of discretion of the Governor as is purported to be made out in the affidavit of the respondents. The petitioners further submit that the affidavit of the Chief Secretary stating that the Order is made in exercise of discretion of the Governor is contrary to the Governor's own Order. The Chief Secretary cannot be permitted to make a statement and contradict the order of the Governor. Reliance is placed on **Mohinder Gill v. Election Commission** (1978) 1 SCC 407.

21. It is further contended that in view of the Judgment of the Apex Court in the case of **Shamsher Singh v. State of Punjab,** (1974) 2 SCC 831 at 885 para 154, the order for dissolution has to be passed on the aid and advice of the Council of Ministers. That is why according to the petitioners in the present case the order speaks that the said order has been made under Article 174(2)(b) "on the aid and advice of the Council of Ministers".

22. The learned counsel for the petitioners relying upon Constituent Assembly Debates; Official Report and report of Sarkaria Commission contended that the

Constitution had contemplated that in the matter of dissolution, the Governor would be required to act in his discretion but this provision was subsequently deleted on the ground that the Governor need not discharge this function as per his discretion and would fully be advised in all these matters by the Council of Ministers. Attention was invited to the Constituent Assembly Debates Official Report, Vol.VIII, Page 41, Vol.III and Sarkaria Commission Report, Para 4.11.16.

23. Based on above foundation, the Petitioners pressed into service a Division Bench Judgment of this Court in the case of **Pratapsingh Rane v. Governor of Goa,** A.I.R. 1999 Bombay, 53 and relied upon para 29 of the said judgment, relevant portion thereof reads as under :-

> " (i) The exercise of executive power in accordance with the provisions of the Constitution by or under the Order of the Governor wherein full judicial review is available.
>
> (ii) Orders passed by the Governor on aid and advice of the Council of Ministers headed by Chief Minister wherein full judicial review is available.
>
> (iii) Orders like grant of pardon under Article 161 and the Orders passed by the President on the report submitted by the Governor under Article 356 on account of which limited judicial review is available and
>
> (iv) Where Governor acts

> without aid and advice of the Council of Ministers headed by Chief Minister and acts in his own discretion. "

24. In the present case, according to the petitioners, the Governor has acted on the aid and advice of the Council of Ministers and therefore this case would be well within the sweep of category (ii) mentioned in para 27 Supra wherein full judicial review is available. In other words, in this case since the Governor has not acted in his sole discretion but based his judgment on the aid and advice of the Council of Ministers, his action is not immune from challenge in the Court.

25. The petitioners further contend that in view of the judgment of the Apex Court in the case of **B.R. Kapur v. State of Tamil Nadu,** 2001 Vol.7 SCC 231 the current view of the law is that if any action is taken by the Governor even in the matter of appointment of the Chief Minister, and if the action of the Governor is found to be contrary to the Constitution, the Court will have the power to strike it down. In their submission the action of the highest authority including the President of India; who is advised by his Council of Ministers is amenable to judicial review as was ruled by the Apex Court in the case of **Kehar Singh v.Union of India,** 1981 1 SCC 204.

26. The petitioners, on the aforesaid legal foundation looking to the facts of the case on hand, contend that on 27.3.2002 the Cabinet met at 10.30 a.m. and decided to recommend to the Governor to immediately dissolve the State Legislative Assembly. In absence of any explanation for such immediate dissolution, it is logical to infer that it was required to be effected immediately to prevent the diminution in the strength of the party in power.

27. The petitioners further contend that under Articles 202 and 204 of the Constitution the Annual Financial Statement is required to be laid before the Assembly in respect of the financial year and a bill to provide for appropriation is required to be introduced. Rather than taking steps for passing the budget or a Vote on Account, the Assembly was dissolved with immediate effect. Any chance of voting in the Assembly was sought to be avoided due to apprehension that the Government would not be able to pass the resolution in which event it would amount to a vote of no confidence in the Government. Based on these factors, the contention advanced is that the only hidden reason for seeking dissolution of the Assembly was to avoid a test on the floor of the Assembly. The contention therefore, is that the dissolution ordered on 27.2.2002 was nothing but a blatant abuse of the power of the Governor under Article 174(2)(b) of the

Constitution.

28. The petitioners, further contend that the reasons sought to be given or the explanation sought to be offered in the affidavit of the respondents is patently false because, according to the Chief Minister (Respondent No.3) Government had the strongest majority of over 2/3rd of the Legislative Assembly; which could pass any legislation or policy it desired. No change of circumstances were pleaded or brought on record for seeking a fresh mandate. Therefore, in absence of any legitimate reason it is logical to conclude that this immediate dissolution was intended to prevent loss of political support in the Assembly. In his submission the power to dissolve the Legislative Assembly has been abused for the purpose not authorised by law, only to avoid loss of strength in the Legislative Assembly and an attempt to survive by dissolution and to remain in power as a Caretaker Government and to take another chance at the polls whilst remaining in power as the Government.

29. The petitioners further went on to urge that all powers vested in the Constitution or statutory authority can be exercised for legitimate purpose. If the power is misused for an illegitimate purpose, the Court should not hesitate to strike down such an exercise treating it as a fraud on the Constitution. The

petitioners further contend that the plea of popular mandate put forth in the aid and advice to dissolve the Assembly is self contradictory if examined on the basis of the claim of the respondent No.3 that he had majority of 2/3rds in the Assembly. It is further submitted that political expediency cannot be pressed into service to cover illegal action. The Court is not precluded from examining the question of exercise of power merely because it has political overtones. He relied upon the judgment of the Apex Court in the case of **State of Rajasthan v. Union of India,** (1977) 3 SCC, 592.

30. The petitioners further contend that it was incumbent upon the respondents to place before the Court material on which the advice was tendered to the Governor for dissolution. If any action taken by the Governor in exercise of his function is questioned in a Court of law, it is for the Council of Ministers to justify the same including their decision. In such a case there is no question of not disclosing any material possessed by the Council of Ministers alleged to be shown to the Governor which is required to be inquired into by the Court under Article 163(3) of the Constitution as held by the Apex Court in the case of **S.R. Bommai v. Union of India,** A.I.R. 1994 S.C., 1918 (Paras 241, 242 and 321 and 323).

31. It is further contended that the Government

cannot claim shelter for disclosure on the ground of privilege so as not to disclose Cabinet decision; as is attempted to be done in the affidavit of the Chief Secretary, of the State. There could be no injury to public interest if the Cabinet decision is disclosed. In the present case in the interest of justice all material including Cabinet decisions ought to have been disclosed or at any rate the Court has the power to inspect the relevant documents including class of documents or other material and in absence of disclosure of any such material it would be logical on the part of the Court to infer legal mala fides; since the power has been exercised by the Governor for the purpose not authorised by law.

32. It is further contended that Article 174(2)(b) of the Constitution postulates that the Governor may, from time to time dissolve the Legislative Assembly. Although there are no express words of limitation in Article 174(2)(b), still the Governor's power will have to be read subject to limitation implied in the Scheme of the Constitution keeping in mind that rule of law, responsible and representative parliamentary democracy are essential features of the Constitution. Limitations on the power of the Governor can further be spelt out from the preamble to the Constitution to constitute a democratic republic and the oath to be taken by the Governor to preserve, protect and defend the Constitution and the law (Art.159) and the

Ministers (Schedule II). It is further contended that in the case of **Samsher Singh v. State of Punjab,** A.I.R. 1974 S.C., 2192 (para 154) the Supreme Court listed the following as one of the exceptional situations in which the President/Governor may not act upon and in accordance with the advice of the Ministers :-

> " (C) the dissolution of the House where an appeal to the country is necessitous, although in this area the head of State should avoid getting involved in politics and must be advised by his Prime Minister (Chief Minister) who will eventually take the responsibility for the step. We do not examine in detail the constitutional proprieties in these predicaments except to utter the caution that even here the action must be compelled by the peril to democracy and the appeal to the House or to the country must become blatantly obligatory.

33. Based on the aforesaid passage, two limitations were sought to be spelt out:- (i) action must be compelled; and (ii) the appeal to the House or to the country must become blatantly obligatory. In the submission of the petitioners none of these circumstances were in existence warranting dissolution of the Assembly.

34. The petitioners further contend that in a written Constitution it is rarely that everything is said expressly. Powers and limitations are always implied from the scheme and other provisions of the Constitution.

Implied limitations have been read into the Constitutional provisions. Reliance is placed on the case of **Kesavananda Bharati** 1973 (4) SCC 225. It is contended that Art. 368 of the Constitution does not speak of any limitations though plenary in nature has been held by Supreme Court to be subject to implied and inherent limitations; namely, that power of amendment cannot be so exercised as to destroy or damage the basic structure of the Constitution. Applying the doctrine that the basic structure of the Constitution constitutes an implied limitation on the power of amendment under Article 368; Supreme Court struck down Article 368(5) of the Constitution. The petitioners relied upon another instance of implied limitation arising out of constitutional scheme emerging from is the doctrine that Parliament cannot intrude into judicial field and nullify judgment of the Court without removing the legal infirmity or the legal base of the judgment. The judgement of the Apex Court in the case of **Janapada Sabha, Chhindwara** (1970) 1 SCC 509, is relied upon wherein it was ruled that it was not open to the Legislature to overrule or set aside the decision of the Apex Court keeping in view the Constitutional Scheme under the Constitution. The petitioners further relied upon the passage from the Administrative Law by Wade & Forsyth, 8th Edition to contend that there is no unfettered discretion in public law:-

> " There is no unfettered discretion in public law. Statutory power conferred for public purpose is conferred as it were upon trust not absolutely, that is to say it can be validly used only in the right and proper way, which Parliament when conferring it is presumed to have intended. Although the Crown lawyers have argued in numerous cases that unrestricted permissive language confers unfettered discretion, the truth is that, in a system based on rule of law unfettered governmental discretion is contradiction in terms. There is nothing paradoxical in the imposition of such legal limits. It would be indeed paradoxical if they were not imposed. Nor is this principle an oddity of British or American law. It applies no less to the Ministers of the Crown. Nor is it confined to the sphere of administration. It operates wherever discretion is given for a public purpose. It is only where powers are given for personal benefit of the person empowered that the discretion is absolute. Plainly this can have no application in public law.
>
> For the same reasons there should in principle be no such thing as unreviewable administration discretion which should be just as much a contradiction in terms as unfettered discretion.
>
> It remains axiomatic that all discretion is capable of abuse and that legal limits to every power are to be found somewhere."

35. The petitioners also took me through the passage from the book of O. Hood Philips & Jackson on Constitutional and Administrative Law, 8th Edition, (page 166), reading as under:-

> " The reason for the general conventions that the Sovereign is bound by the advice of her Ministers is not applicable if they do not represent the wishes of the electorate (or the Commons). Among other factors that would have to be taken into account before the Sovereign could properly refuse a dissolution would be the time that had elapsed since the last dissolution, whether the last dissolution took place at the instance of the present opposition, whether the question in issue is of great political importance, the supply position, (the grant of a dissolution must be dependent on supply having been voted to the Crown for the period that would elapse before the meeting of the new Parliament) whether Parliament is nearing the end of its maximum term, whether the Prime Minister is in a minority in the Cabinet, and whether there is a minority government. "

Based on the above passages it was contended that it was not obligatory on the part of the Governor to accept the action tendered on the advice of the Council of Ministers.

36. The petitioners further argued that under Article 163(2) the Governor himself is the authority to decide whether he is required by or under the Constitution to act in his discretion. The Council of Ministers will, therefore, be powerless as against the Governor on difference of opinion on this question. No Court can nullify its decision on the ground that he should not have acted in his discretion in respect of the matter before the Court. Therefore, the submission is, if the question arises whether any matter is or is not a matter as respect

to which Governor is by or under any provision of the Constitution required to act in his discretion, the decision of the Governor on that question is final and the validity of anything done by the Governor is not to be called in question on the ground that he ought or ought not to have acted in his discretion. Under Article 163(2) the Governor is the sole Judge to decide whether or not any power is required by the Constitution to be exercised in his discretion and the Courts are precluded from examining that question but the ultimate decision taken by the Governor is open to challenge in the Court of law. On the aforesaid canvas of submissions; a prayer is made to exercise power of review and to examine the order of the Governor, dissolving the Assembly and consequent order appointing – asking the outgoing Ministry to continue as a caretaker Government, applying all judicial parameters of administrative law and set aside the same holding it bad, illegal and contrary to the scheme of the Constitution of India.

**Submissions of Respondents:**

37. PER CONTRA, the learned Advocate General on behalf of the respondent No.1/State, refuting all the submissions advanced on behalf of the Petitioners, at the outset, contends that there is material, literal and substantive distinction and difference between Art.174

(2)(b) and Art.356 of the Constitution of India. Material available such as Governor's report, other reports, etc. in case of Art.356 can never be present in matters of dissolution under Art. 174(2)(b). The condition for the exercise of the powers under Art.356 and Art. 174(2)(b) are entirely different. Therefore, **Bommai's** case (cited supra) is not applicable in the present case. **Bommai's** case was one dealing with a situation, wherein; there could be an impending danger to the federal structure/federation; when President's Rule is inflicted; while under Art.174(2)(b), dissolution is voluntary made on recommendation of the Chief Minister, Council of Ministers by the Governor.

38. He further contends that in either of the petitions there is no whisper of mala fides against the Governor as such petitioners cannot be allowed to canvas this contention across the Bar. The pleadings allege that the advice was given by the Chief Minister and not by the Council of Ministers and further alleged that the Chief Minister malafidely mis-represented it to be the decision of the Council of Ministers, which is clearly negatived by all the affidavits filed in reply. It is further pointed out no ground is taken in the petitions nor alleged in the petitions that there was no material before the Council of Ministers or Governor. No averment is to be found in the petitions in this behalf nor is it pointed out during the

course of hearing as to which Article is violated or that there was legal prohibition for dissolution of the Assembly. In his submission the entire petition raises serious disputed questions of fact; which are incorrect and seriously disputed by the respondents. The petitions therefore, are required to be dismissed on this short count.

39. He further contends that the petition is not maintainable in view of the protection to the action taken by the Governor keeping in view the provisions of Article 163(2) and Article 161 of the Constitution; as such the Writ Petitions challenging the order of dissolution are not maintainable in law. In his submission the Governor as per Article 361 enjoys immunity and would not be answerable to any Court for the exercise and performance of powers and his duties subject to the exception; such as blatant or serious violation of a Constitutional provisions, lack of power.

40. He further pressed into service the argument that the Governor exercises discretionary power when he accepts advice of the Council of Ministers and no court would enquire into such advice tendered by the Council Ministers. The very decision of the Governor to accept the advice of the Council of Ministers is an act of discretion. He further contended that the petitioners

have no right as members of the Legislative Assembly to have an undissolved term of 5 years or a tenure of 5 years. Tenure of Assembly of 5 years is subject to the factum of earlier dissolution. The words "unless sooner dissolved" in Art.172 clearly indicate that power under Art.174(2)(b) intervenes and overrides the normal term of the Legislative Assembly. It is the prerogative and an absolute right of a party commanding majority in the House to seek Dissolution on ground of political expediency and Governor normally is bound to act in harmony with such advice of the Chief Minister. In support of his submissions he placed reliance on paragraphs (54), (55), (88), (108) and (154) appearing in **Samsher Singh's case** (Supra) and also borrowed support from Sarkaria Commission Report, Volume (I), page 185.

41. He further contended that the Constitution is silent as to when the Government can dissolve the Legislative Assembly. In his submission two propositions are available:- (a) Governor may not dissolve the House suo motu, without Ministerial advice; (b) A Chief Minister having a majority support can get a dissolution of the House as and when he wants,in other words like in other democratic set up in other parts of the world, it is for the Chief Minister to choose the most propitious/opportune time to go for public mandate. He further contended that such advice given by the Council of

Ministers recommending dissolution of the Legislative Assembly being for political reasons is beyond judicial scrutiny. The judicial review is available in matters which are covered by Constitutional questions such as violation of Constitutional provision or breach of Constitutional mandate.

42. He further submits that on a plain reading of Article 174(2)(b) it is clear that the power of the Governor to dissolve the Assembly is untrammelled in the sense no restrictions are put on the Governor in exercise of the said power unlike Article 356, which can only be invoked in case of failure of the Constitutional machinery in any State. Article 356 requires the President to be satisfied regarding the failure or breakdown of the Constitutional machinery in the State; whereas Article 174(2)(b) does not postulate such kind of satisfaction of the Governor before dissolving the State Assembly. In his submission, the present petitions have raised questions which intricately relate to political thicket and are not the Constitutional questions. He further submits that the affidavits filed on behalf of respondent No.2 clearly prove beyond doubt that the advice was on the Council of Ministers and the resolution was adopted after due deliberations at the Cabinet meeting, the contents of which cannot be disclosed. The claim of privilege in this behalf has already been made in the affidavit filed by the

State Government. He further submits that the impugned orders cannot be challenged as they have been passed in exercise of the discretionary powers of the Governor. The discretionary powers are not subject to challenge in view of the provision contained in the Article 163(2) and Article 361 of the Constitution of India. In his submission the judicial review of exercise of discretionary powers can be on the ground; (a) There is total absence of power, and (b) if the power exists, the authority either exceeds its power or ignores standards contained such as preconditions, etc. prescribed in the statute for the exercise of that power. In his submission the effect of dissolution of Assembly by Governor under Article 174(2)(b) is nothing but for the purpose of fresh election and there was no other alternative available. He submitted that the Cabinet decision was taken in order to go for fresh elections to secure a fresh popular mandate which is clearly borne out from the Affidavit as well as admissions flowing from averments contained in the petitions in this behalf. He relied upon specific averment made in Writ Petition No.88/2002 which states, "the Chief Minister dissolved the Assembly to go for a popular mandate" and also pressed into service some of the pleadings contained in the petitions so as to point out that the Assembly in a recent past had suffered two defections i.e. prior to dissolution. Based on the aforesaid submission he submitted that the Governor was

well within his right to accept the advice tendered by Council of Ministers enjoying majority of the House and prayed for rejection of the petition.

43. Shri R.N. Trivedi, learned Additional Solicitor General of India, appearing for the Governor, contends that Part XVIII of the Constitution relates to "emergency provisions" which is an exception to the normal democratic functioning of the Legislature and the Executive of the State. The decision to exercise power under Article 356 is dependent upon the "satisfaction" of the President on receipt of "Report" from the Governor. This predicts an objective assessment by the Governor and its evaluation by the President. Being an exception, the reasons and causes for promulgation of President's Rule can have no general application, nor the principles laid down for determining the scope and nature of power and the extent of its justiciability is relevant for interpreting the provisions like Article 174 read with Articles 163 and 161 of the Constitution. In his submission, the Report and the satisfaction should be such as a reasonable person would come to a conclusion that a situation has arisen in which the Government of the State cannot be carried on in accordance with the provisions of the Constitution. He further submitted that the Constituent Assembly was of the unmistakable opinion that the power under Article 356 should be resorted only in exceptional cases and as a last

resort. He further submitted that a suggestion was made before the Constituent Assembly while debating draft under Article 153 (now Article 174) that the power of dissolution should be exercised by the Governor only "if the Governor is satisfied that the administration is failing and the Ministry has become unstable." The proposed amendment was negatived. It is, therefore, submitted that certain restrictions and conditions proposed under Article 174 were consciously and deliberately negatived. The things which were consciously excluded cannot be implied. It is thus urged that circumstances and the nature of exercise of power under Article 356 and Article 174 are two ends of spectrum.

44. He further submitted that the observations made by the Supreme Court in the case of **S.R. Bommai** (supra) related to the scope and power under Article 356, the extent and standard of permissive judicial review, interpretation of "satisfaction", the need for disclosure of "material" leading to satisfaction and its evaluation. He submitted that power conferred by Article 356 is a conditional power; it is not an absolute power to be exercised in the discretion of the President. The existence of the relevant material is a precondition to the formation of the satisfaction. The Apex Court in the wake of conditional power was pleased to hold that

judicial review is possible only to a limited extent, that too, in case of subjective political judgment, where satisfaction is perverse, malafide or based on extraneous grounds. In order to ascertain whether the satisfaction is subjective, the material on which the satisfaction is based needs to be examined but such satisfaction is not necessary when power under Article 174(2)(b) is to be exercised. To summarise some of the basic differences between Article 356 and Article 174 he highlighted some of the point reproduced in undermentioned comparative chart:

| ARTICLE 356 | ARTICLE 174 |
|---|---|
| 1. Failure of constitutional machinery. | 1. No failure of constitutional machinery. |
| 2.Cannot be made on a Government being reduced to minority. | 2. Appeal to the electorate is expedient. |
| 3. Not on advice of Council of Ministers. | 3. On advice of Council of Ministers which is invariably accepted. |
| 4. Dismissal inflicted by the President on report of the Governor. | 4. Voluntary action of the Council of Ministers which on the date of the advice has majority and even by a minority government. |
| 5. Proclamation is subject to limited judicial review as it is based on the report of the Governor and the President has to be "satisfied" that there was failure of Constitutional machinery. Stating | Judicial review is not possible as there are no words of limitation and there being no judicially manageable standard, stating of reasons is not required. |

| | |
|---|---|
| of reasons is thus mandatory. | |
| 6.Casts a stigma on Government. | 6. Calling for elections does not cast any stigma. |
| 7.Judicial review permissible. | 7. Judicial review not permissible. |
| 8.It can be exercised only in case of failure of Constitution in the State. | 8. No such requirement is contemplated. |

45. The learned Additional Solicitor General referring to the Division Bench Judgment of this Court in the case of **Pratapsingh Rane** (supra) contended that the said case related to a dismissal of Chief Minister and the appointment of another person as the Chief Minister. In that context, propositions were submitted on behalf of the Respondent No.2 in that case. He submitted that proposition (ii) in that case was never accepted or recognised as a settled legal proposition by the Court but the same was relied upon based on concession; since the said proposition was accepted by all the concerned parties in the case. As a matter of fact in his submission the said question did not arise for determination and thus cannot be treated as a precedent.

46. In his submission, the Governor's power of dissolution under Article 174 is not an "executive power" but it is a "Constitutional power". Alternatively, he

submits that even if it is held to be an executive powers, it is not the exercise of all such power which is subject to full judicial review. Dissolution is one such exception. He further submitted that the principle of **S.R. Bommai's case** (supra) to dissolution under Article 174(2)(b) cannot be applied. He pressed into service Para (209) of **S.R. Bommai's** decision wherein it has been observed that "..... the prorogation of Parliament or **dissolution of parliament** done under Article 85 is not liable to judicial review." He further submitted that the decision of the Apex Court in the case of **S.R. Bomma**i cannot be treated as a precedent for interpreting Article 174. There is no requirement for the Governor to mention in the Order under Article 174(2)(b) about material on the basis of which the dissolution was based. He thus submitted that the decision in the case of **S.R. Bommai** (supra) should be read in the context of the provision of Article 356 and not in isolation. A decision is only an authority for what it actually decides.

47. The learned Additional Solicitor General further submitted that normally the Governor has to exercise his power in harmony with the advice of the Council of Ministers. In the matter of dissolution, the Governor is bound by the advice of the Council of Ministers as held by the Apex Court in the case of **Shamser**

**Singh** (supra). He further drew support to this submission from the British Parliamentary system and tried to point out that in England the Parliament is dissolved on the advice of the Prime Minister which is invariably accepted (Halsbury's Laws of England Vol.I(34) 4th Edition). He also tried to show that in Canada, there was only one incident where the advice of the Prime Minister was not accepted for dissolving the House.(Constitutional law of Canada, 3rd Edition, By Peter W. Hogg. Page 251). He also relied upon the report of the Sarkaria Commission wherein similar recommendations were made.

48. He further contends that the entire pleadings in the Petitions are based on the assumptions that the Respondent No.3 (Chief Minister) was not likely to continue with the majority and that the Leader of the Opposition was not called upon to explore the possibility of forming an alternate Government without pleading that on the relevant date any other party other than ruling party had a majority support. Lastly, he submits that the Order, directing dissolution of the House/Assembly being a discretionary Order of the Governor based on the political judgment taken by the Council of Ministers, is not open to judicial review and that there are no judicially discoverable and manageable standards for the judicial review of the Order of dissolution based on political

expediency. It is further submitted that Governor enjoys complete immunity in view of Article 161, as such, this Court should not dwell upon the contentions sought to be raised in the Petition and prayed for dismissal of the Petition.

49. Shri M.S.Usgaonkar, learned Senior Counsel appearing for the Respondent No.3 while adopting the submissions made on behalf of Respondents No.1 and 2, contends that not a single breach or abuse of Constitutional power on the part of the Governor is to be found in either of the Petitions. If no breach was pleaded, no reply was called for from the Respondents. He further pressed into service the submission that the decision given by the Governor being final and as per Article 163(1), second part, read with Article 163(2),the same is immune from judicial review and further contended that the decision given by the Governor as per the advice of the Council of Ministers is not open to debate in any Court. It is outside the purview of the judicial review.

50. He further submitted that there is no legal right in the Member of Legislative Assembly to have the Assembly for 5 years, but on the contrary the wording of Article 174(2) namely "time to time" is an indication that there is no Constitutional provision prohibiting the

dissolution before its term. Article 172 itself states that the life of an Assembly is 5 years unless sooner dissolved, indicating that it can be dissolved at any time before expiry of 5 years.

51. He further tried to highlight the shifting stand taken by the Petitioners from time to time. In his submission, as per the frame of the Petitions it was sought to be pleaded in the Petitions that the recommendation for dissolution was an unilateral act of the Respondent NO.3, Chief Minister. In the light of the replies filed, this point was not pressed for and the arguments proceeded on the basis that there was a recommendation of the Council of Ministers. He further pointed out from the frame of the Petitions that it was sought to be further pleaded in the Petitions that the Government headed by Respondent No.3 did not have stable majority. In the light of reply filed that point was not pressed for and the argument proceeded on the basis that the Government headed by Respondent No.3 had almost 2/3 majority in the House of 40.

52. The learned Counsel for Respondent No.3 drew my attention to the Ground (C) (page 10) of Writ Petition No.84 of 2002 and submitted that the Petition appears to be founded on wrong assumption that the advice of the

Chief Minister was not of Council of Ministers but was a unilateral advice of the Chief Minister, as it had no support of the remaining other Ministers. He submitted that the Respondent No.3 denied the said facts in Paras (41) and (45) of his Affidavit, as such the very basis of the Petition being based on absolute falsehood it needs to be thrown out.

53. Mr. Usgaonkar further criticised the tenor of the Petition it being suggestive of encouraging defections. In his submission, the Leader of the Opposition never staked his claim to form Government or never claimed majority in the House at any time till dissolution. Not a single Member of the Legislative Assembly at any time approached the Governor or any authority like Speaker informing withdrawal of support to the Council of Ministers. The Council of Ministers did not resign at any point of time. Consequently, the question of formation of the alternate Government did not arise at any time. If that be so, no fault can be found in the action of the Governor if he has accepted the advice of the Council of Ministers enjoying confidence of the House. In his submission looking the Constitutional scheme the said advice was binding on the Governor as such he has rightly accepted the same considering the prevailing political scenario in the State of Goa. He

thus prayed for dismissal of the Petitions.

54. Shri M.S. Usgaonkar, learned Senior Counsel appearing for the Respondent No.3,Chief Minister, submitted that since the present Petitions are praying for writs in the nature of Certiorari, to challenge not an executive action but an action taken in exercise of Constitutional power exercised by highest Constitutional functionary of the State, the parameters of Constitutional power and justiciability have to be kept in mind while dealing with such types of cases.

55. The learned Counsel further took me to the entire test of the Petitions and tried to demonstrate from the various quoted instances given by the Petitioners to show that the Petitioners themselves do not dispute that the Governor was required to use his discretion while exercising his powers and discharging his functions under Article 174(2)(b) read with Article 163. In order to buttress his submission he pressed into service certain allegations and/or averments leading to undue haste on the part of the Governor in dissolving and accepting the advice of the Council of Ministers. He pointed out that the Petitioners strongly tried to make out a case that the Governor ought to have called upon the Leader of Opposition and given him an opportunity to prove his

majority. In his submission all these instances are sufficient to clearly indicate that as per the Petitioners own submission the dissolution of the Assembly was an action taken by the Governor in his discretion. The learned Counsel, therefore, submits that the discretion of the Governor is immune from judicial review. He submits that the attack made against the action of the Governor is therefore without merit. Consequently, the said action cannot be faulted with on the ground that the Governor ought or ought not to have acted in a particular manner in exercise of his discretion under Article 163(2) and therefore the Petition is not maintainable.

56. He further criticised the tenor of the Petitions it being suggestive of encouraging defections. In his submission, the Leader of the Opposition never staked his claim to form Government or never claimed majority in the House at any time till dissolution. Not a single Member of the Legislative Assembly at any point of time approached the Governor or any authority; like; Speaker informing withdrawal of support to the Council of Ministers. The Council of Ministers did not resign at any point of time. Consequently, the question of formation of the alternate Government did not arise at any time. If that be so, no fault can be found with the action of the Governor if he has accepted the advice of the Council of

Ministers enjoying confidence of the House. In his submission looking to the Constitutional scheme; the said advice was binding on the Governor as such he has rightly accepted the same considering the prevailing political scenario in the State of Goa.

57. The learned Counsel while concluding his submissions, submits that the present Petition is of dissolution of Legislative Assembly on the aid and advice of the Council of Ministers commanding majority in the House. Even otherwise, the Governor having acted on the advice of the Council of Ministers, such action cannot be faulted with in view of Article 163(3). The question of whether any, and if so what, advice was tendered by the Ministers to the Governor cannot be enquired into in or by any Court as such the question of producing advice and/or material in support thereof, does not arise. He strongly submitted that the Petitioners miserably failed to discharge their burden. At any rate onus, did not shift on the Respondents as such there was no question of producing any material in rebuttal. He submits that these Petitions should not be examined on merits. He relied upon some of the passages from the judgment of **S.R. Bommai** (supra) in support of his submissions. advice which cannot be enquired into, there is no material which can be produced.

CONSIDERATION

58. Having heard the rival contentions, one thing is clear that both sides canvassed two extreme points of view before me.

ONE VIEW, that the power of dissolution exercised by the Governor under Article 174(2)(b) is in exercise of his discretion though that might have been exercised on the basis of aid and advice of the Council of Ministers with the Chief Minister at its head and the same is beyond the judicial scrutiny by virtue of immunity conferred by Article 163(2) and (3) of the Constitution.

THE OTHER VIEW, canvassed is that the power of dissolution exercised by the Governor having been exercised on the basis of the advice of the Council of Ministers, there is no question of exercise of discretion, as such full judicial enquiry is available and at any rate assuming dissolution to be an outcome of the discretion of the Governor, still the material on the basis of which advice was tendered is open for judicial scrutiny; may be to a limited extent i.e. to the extent of examining its constitutionality.

59. Both views have strong friends to support.

Both views were strongly canvassed with strong back-up material, by the rival parties to support their rival submissions. Before going to dwell on the question whether or not judicial review is available, it is necessary to examine: is it a fit case to undertake this judicial exercise ? In the case of **S.R. Bommai** (supra) on which heavy reliance was placed by the Petitioners in unequivocal terms said thus:

> " ...Before exercise of the court's jurisdiction sufficient caution must be administered and unless a strong and cogent prima facie case is made out, the President i.e. the Executive must not be called upon to answer the charge. In this connection I agree with the observation of Ramaswamy, J. I am also in agreement with Verma, J. when he says that no quia timet action would be permissible in such cases in view of the limited scope of judicial review in such cases."

60. The same view has been reiterated by Justice Jeevan Reddy in the following words:-

> " We agree that merely because a person challenges the validity of the Proclamation, the court would not as a matter of course call upon the Union of India to produce the material/information on the basis of which the President formed the requisite satisfaction. The court must be satisfied, prima facie, on the basis of the averments made by the petitioner and the material, if

> any, produced by him that it is a fit case where the Union of India should be called upon to produce the material/information on the basis of which the President formed the requisite satisfaction."

61. Thus looking to the above majority opinion coming from Justice Ahmadi, Justice Verma for himself and Justice Yogeshwar Dayal, Justice Ramaswamy, Justice Jeewan Reddy for himself and Justice Agrawal, I would be failing in my duty if I do not examine, prima facie, as to whether or not a strong and cogent prima facie case is made out by the Petitioners on the basis of averments made in the Petitions and the material; if any, produced by them so as to shift onus of proof on the Respondents. I therefore propose to first address myself on the issue; is it a fit case warranting production and examination of the material on the basis of which the decision was taken to advise dissolution of the Assembly or is it a case wherein prima facie burden is discharged by the Petitioners so as to call upon the Respondents to justify their action. It is needless to mention that prima facie case does not mean that the Court will examine the merits of the case closely and come to a conclusion that the Petitioners have a case in which they are likely to succeed. This would be amounting to prejudging the case on merits. All that the Court has to see is that on the face of it the person invoking jurisdiction of the court needs consideration and

which is not to fail by virtue of some apparent defects.

62. I therefore without entering into the hotly debated area giving rise to debatable virgin Constitutional issues, without laying down any law or without determining any question as to whether or not judicial review of the impugned action is permissible, if permissible to what extent it is permissible. This is being made clear because the possibility of overlapping consideration and discussion in Judgment cannot be ruled out inspite of best efforts. I, prima facie; examined the merits of the Petitions to ascertain whether any case is made out so as to shift onus of proof on the Respondents keeping in mind that when any particular proclamation is challenged the burden of establishing its invalidity lies upon the Petitioners. It is for them to produce material to substantiate their contentions. In this behalf it would be useful to quote observations made by Apex Court in the case of **S.R. Bommai** (supra) reading as under:-

> " It was urged by Shri Parasaran, learned counsel appearing for the Union of India that where a person challenges the validity of the Proclamation under Article 356(1), the burden lies upon him to establish its validity and that it is not part of the duty of the Union of India to assist the petitioner in establishing his case. Reliance is placed on certain observations in Stephen Kalong Ningkong. He submitted that it would not be a correct practice for the court to call upon the Union of India to justify and establish the

> validity of the Proclamation merely because a person chooses to question it. We do not think that there ought to be any room for confusion on this score."

There appears to be no dissent on this question amongst the other Judges constituting the Bench.

FINDINGS

62. Having heard parties, these are not the fit cases wherein this Court should dwell on either of the views convassed. These cases are bound to fail by virtue of apparent defects in the petitions. The petitioners could not succeed in shifting onus of proof on the respondents so as to call upon them to justify their action. These petitions cannot succeed because of their own inherent weaknesses. In support of my conclusion the following are the reasons :

REASONS

63. In order to answer the issue, whether or not any case is made out by the Petitioners to call upon the Respondents to produce adequate material to support their impugned action, a cursory look at the Constitutional Scheme or our Constitution, would be necessary.

CONSTITUTIONAL SCHEME

64. Before I proceed to consider the Constitutional Scheme, it is necessary to have a brief look at the historical background and the relevant provisions of the Constitution of India and some of the Judgments of the Apex Court holding the field.

Historical background :

65. The Government of India Act, 1858 transferred the responsibility for administration of India from the East India Company to the British Crown. The Governor then became an agent of the Crown, functioning under the general supervision of the Governor-General. He was the pivot of the Provincial administration.

66. The Government of India Act, 1935 introduced provincial autonomy. The Governor was now required to act on the advice of Ministers responsible to the legislature. The Governor could also act on his discretion in specified matters. He functioned under the general superintendence and control of the Governor General, whenever he acted in his individual judgment or discretion.

67. Independence inevitably brought about a change in the role of the Governor. Until the

Constitution came into force, the provisions of the Government of India Act, 1935 as adopted by the Indian (Provisional Constitution) Order, 1947, were applicable. This order omitted the expressions 'in his discretion'; 'acting in his discretion' and 'exercising his individual judgement' wherever they occurred in the Act. Whereas, earlier, certain functions were to be exercised by the Governor either in his discretion or in his individual judgment, the Adaptation Order made it incumbent on the Governor to exercise these as well as all other functions only on the advice of his Council of Ministers.

68. The framers of the Constitution accepted, in principle, the Parliamentary or Cabinet system of Government of the British model both for the Union and States. While the pattern of the two levels of Government with demarcated powers remained broadly similar to the pre-Independence arrangements, their roles and inter-relationships were given a major re-orientation. The Constituent Assembly discussed at length the various provisions relating to the Governor. Two important issues were considered. The first issue was whether there should be an elected Governor. The second issue related to the extent of discretionary powers to be allowed to the Governor. Following the decision to have a nominated Governor, references in the various articles of the Draft

Constitution relating to the exercise of specified functions by the Governor 'in his discretion' were deleted. The only explicit provisions retained were those relating to Tribal Areas in Assam where the administration was made a Central responsibility. The Governor, as agent of the Central Government during the transitional period could act independently of his Council of Ministers. Nonetheless, no change was made in the Draft Article which referred to the discretionary powers of the Governor. This provision in Draft Article 143 (now Article 163) generated considerable discussion. When Clause 143 of the Draft Constitution (as Article 163 then was) was under discussion in the Constituent Assembly, Shri H.V. Kamath moved an amendment for deletion from this Article the words "except in so far as he is by or under this Constitution required to exercise his function, or any of them in his discretion" and consequent deletion of sub-clause (ii), (which corresponds to clause (2) of the present Article giving a definitive powers to the Governor to decide the question, if any raised, whether any matter is or is not one as respects which he is by or under the Constitution required to act in his discretion). The proposed amendment was vigourously supported by Dr. H.N. Kunzru, Prof. Shibban Lal Saksena, Shri H.V. Pataskar and Shri Rohini Kumar Chaudhuri. The focal point of their criticism was that the wide phraseology in which Clause

143 was couched, gave the Governor a general power to choose in his discretion, whether or not in the performance of any of his functions he had to solicit, abide by or overrule the advice of his Council of Ministers. In concurrence with Shri T.T. Krishnamachari and Shri Alladi Krishnaswami (who opposed the amendment), Dr. Ambedkar tried to dispel the apprehensions of Dr. Kunzru and others by giving this interpretation about the use and scope of Clause 143: "This Clause is a very limited clause, it says except in so far as he is by or under this Constitution". Therefore, article 143 will have to be read in conjunction with such other articles which specifically reserve the power to the Governor. It is not a general clause giving the Governor power to disregard the advice of his Ministers in any matter in which he finds he ought to disregard.

Relevant provisions of the Constitution :

69. Inspite of the aforesaid view of the framers of the Constitution, Article 163 which came to be incorporated in the Constitution, reads as under :

> **163. Council of Ministers to aid and advise Governor.** - (1) There shall be a Council of Ministers with the Chief Minister at the head to aid and advise the Governor in the exercise of his functions, except in so

> far as he is by or under this Constitution required to exercise his functions or any of them in his discretion.
>
> (2) If any question arises whether any matter is or is not a matter as respects which the Governor is by or under this Constitution required to act in his discretion, the decision of the Governor in his discretion shall be final, and the validity of anything done by the Governor shall not be called in question on the ground that he ought or ought not to have acted in his discretion.
>
> (3) The question whether any, and if so what, advice was tendered by Ministers to the Governor shall not be inquired into any Court.

Article 163 states that there shall be a Council of Ministers, with the Chief Minister at the head to aid and advise the Governor in the exercise of his functions, except in so far as he is by or under this Constitution required to exercise his functions or any of them in his discretion. Article 163(2) states that if any question arises whether any matter is or is not a matter as respects which the Governor is by or under this Constitution required to act in his discretion, the decision of the Governor in his discretion shall be final and the validity of anything done by the Governor shall not be called in question on the ground that he ought or ought not to have acted in his discretion.

70. The next Article which needs a reference, is Article 174, which reads as under :

> **174. Sessions of the State Legislature, prorogation and dissolution. -** (1) The Governor shall from time to time summon the House or each House of the Legislature of the State to meet at such time and place as he thinks fit, but six months shall not intervene between its last sitting in one session and the date appointed for its first sitting in the next session.
>
> (2) The Governor may from time to time -
>
> (a) prorogue the House or either House;
>
> (b) dissolve the Legislative Assembly.

Draft Article 153 (3) said that the functions of the Governor under Clauses (a) and (c) of the Clause (2) of the Article shall be exercised by him in his discretion. Draft Article 153(3) was totally amended when it became Article 174 of our Constitution.

71. At this juncture, in order to understand the Constitutional philosophy of Article 163, it is necessary to take into account the historical background of Article 74. Our Constitution deals with the Union and the State Executive separately, but as the provisions follow, a common pattern and are in most cases **mutatis mutandis** the same for the Union and for the States. It would, therefore, be necessary to refer to Article 74 of the Constitution, which reads as under :

> **74. Council of Ministers to aid and advise President.-** [(1) There shall be a

> Council of Ministers with the Prime Minister at the head to aid and advise the President who shall, in the exercise of his functions, act in accordance with such advise:]
>
> [Provided that the President may require the Council of Ministers to reconsider such advice, either generally or otherwise, and the President shall act in accordance with the advice tendered after such reconsideration.]
>
> (2) The question whether any, and if so what, advice was tendered by Ministers to the President shall not be inquired into in any Court."

72. It is noticeable that though in Article 74 it is stated that there shall be a Council of Ministers with Prime Minister at the head to aid and advise the President in exercise of his functions, there is no provision in Article 74 comparable to Article 163 that the aid and advice is except in so far as he is required to exercise his functions or any of them in his discretion.

73. In order to appreciate the contentions raised in these petitions with respect to the role played by the Governor of the State of Goa, I also examined relevant portion of Article 361 of the Constitution.

> **"361. Protection of President and Governors and Rajpramukhs.-** (1) The President, or the Governor or Rajpramukh of a State, shall not be answerable to any Court for the exercise and performance of the powers and duties of his office or for any done or purporting to be done by him in the

exercise and performance of those powers and duties :

Provided that the conduct of the President may be brought under review by any Court, tribunal or body appointed or designated by either House of Parliament for the investigation of a charge under article 61:

Provided further that nothing in this clause shall be construed as restricting the right of any person to bring appropriate proceedings against the Government of India or the Government of a State.

(2) No criminal proceedings whatsoever shall be instituted or continued against the President, or the Governor of a State, in any court during his term of office.

(3) No process for the arrest or imprisonment of the President, or the Governor of a State, shall issue from any court during his term of office.

(4) No civil proceedings in which relief is claimed against the President, or the Governor of a State, shall be instituted during his term of office in any court in respect of any act done or purporting to be done by him in his personal capacity, whether before or after he entered upon his office as President, or as Governor of such State, until the expiration of two months next after notice in writing has been delivered to the President or the Governor, as the case may be, or left at his office stating the nature of the proceedings, the cause of action therefor, the name, description and place of residence of the party by whom such proceedings are to be instituted and the relief which he claims.

74. At this juncture, it will not be out of place to mention that much debate was generated on the scope of Article 163 vis-a-vis Article 356 of the Constitution. Article 356 deals with provisions in case

of failure of constitutional machinery in States. However, reproduction thereof is not necessary.

75. The constitutional scheme reveals that the executive power of the Union is vested in the President under Article in the President under Article 53(1). The executive power of the State is vested in the Governor under Article 154(1). The expressions "Union" and "States" occurring in Articles 53(1) and 154(1) respectively to bring about the federal principles embodied in the Constitution. Any action taken in exercise of the executive power of the Union vested in the President under Article 53(1) is taken by the Government of India in the name of the President as will appear in Article 77(1). Similarly, any action taken in the exercise of the executive power of the State vested in the Governor under Article 154(1) is taken by the Government of the State in the name of the Governor as will appear in Article 166(1).

76. There are two significant features in regard to the executive action taken in the name of the President or in the name of the Governor. Neither the President nor the Governor may sue or be sued for any executive action of the State. First, Article 300 states that the Government of India may sue or be sued in the

name of the Union and the Governor may sue or be sued in the name of the State. Second, Article 361 states that proceedings may be brought against the Government of India and the Government of the State but not against the President or the Governor. Articles 300 and 361 indicate that neither the President nor the Governor can be sued for executive actions of the Government. The reason is that neither the President nor the Governor exercises the executive functions individually or personally. Executive action taken in the name of the President is the action of the Union. Executive action taken in the name of the Governor is the executive action of the State. Article 361 provides absolute immunity to the President and the Governor for the exercise and performance of the powers and duties of their office or for any act done or purporting to be done by them in the exercise and performance of those powers and duties, subject, as regards the President, to an impeachment under Article 61. Article 361(2) offers a complete immunity to the Governor not only against the institution of such proceedings but against their continuance if he was appointed as a Governor after the proceedings were instituted.

77. Having created the offices of the President and the Governor, and vested the executive power of the

Union and the States respectively in them, the executive power of the Union is made co-extensive with its legislative power, except that unless expressly provided in the Constitution or by any law made by Parliament, the executive power does not extend to any matter in the concurrent legislative list. Similarly, the executive power of the State is made co-extensive with its legislative power, subject, as regards matters in the concurrent legislative list, to the executive power expressly conferred by the Constitution or by any law made by Parliament, upon the Union or the authorities thereof.

78. The exercise of the executive power of the Union or the States is a function of the President and the Governors respectively and in order to aid and advise them in the exercise of their functions, provision is made for a Council of Ministers. Article 74(1) provides that there shall be a Council of Ministers with the Prime Minister at the head. The question whether any and if so what advice was tendered by ministers to the President is not to be inquired into in any Court. Articles 163 and 164 contain mutatis mutandis the same provisions for the Council of Ministers to aid and advise the Governor with the qualification that the Council of Ministers is to "aid and advise the Governor in exercise of his

functions, except in so far as he is by or under this Constitution required to exercise his functions or any of them in his discretion." If any question arises, whether any matter is or is not a matter as respects with the Governor is by or under the Constitution required to act in his discretion, the decision of the Governor on that question is final and the validity of anything done by him is not to be called in question on the ground that he ought or ought not to have acted in his discretion. The executive power is not defined in our Constitution. Articles 73 and 163 are concerned primarily with the extent of executive power, and its distribution between the Union and the States.

79. A Seven Judges Bench decided a very important question about the constitutional position of the President and the Governor under our Constitution. The Seven Judges Bench was constituted to consider whether the decision in the case of Sardari Lal v. Union of India, A. I.R. 1971 S.C. 1547 was correct. The decision lays down the following proposition:

> " (a) Our Constitution generally embodies the Parliamentary or the Cabinet form of Govt. on the British model, both for the Union and the States.
>
> (b) It is a fundamental principle of English constitutional law that the

Sovereign does not act on his own responsibility but on the advice of his Ministers who accept responsibility and who command the confidence of the house of Commons. This principle of English constitutional law is embodied in our Constitution.

(c) It follows from the British form of Parliamentary or Cabinet Govt. that the President and the Governors are the formal or Constitutional heads of the Union and the States and they must act with the aid and advice of the Council of Ministers except where a contrary provision is made by the Constitution.

(d) ...

(e) ...

(f) However, the position of the Governor is slightly different, because, Art. 163 provides: "Council of Ministers to aid and advise Governor.- (1) There shall be a Council of Ministers with the Chief Minister at the head to aid and advise the Governor in the exercise of his functions, except in so far as he is by or under this Constitution required to exercise his functions or any of them in his discretion. (2) If any question arises whether any matter is or is not a matter as respects which the Governor is by or under this Constitution required to act in his discretion, the decision of the Governor in his discretion shall be final, and the validity of anything done by the Governor shall not be called in question on the ground that he ought or ought not to have acted in his discretion. (3) The question whether, any, and if so, what advice was tendered by Minister to the Governor shall not be inquired into in any Court."

(g) Provisions of our Constitution which use the expression "in his discretion" with reference to the Governor are : Art.. 371A(1)(b) and (d) and 2(b) and (f), and Sch.VI paras 9(2) and 18(3). In addition to the expression provisions mentioned above there are two provisions where, by necessary

implication, the Governor can act in his discretion. Thus Art. 356 shows that the Governor can make a report to the President that a situation has arisen in which the Government of the State cannot be carried on in accordance with the provisions of the Constitution. "Here the Governor would be justified in exercising his discretion even against the advice of his Council of Ministers (because) the failure of the Constitutional machinery may be because of the conduct of the Council of Ministers". Again, "Art. 200 requires the Governor to reserve (for the consideration of the President) any Bill which in his opinion if it became law would so derogate form the Power of the High Court as to endanger the position which the High Court is designed to fill under the Constitution... Art. 200 indicates another instance where the Governor may act irrespective of the advice from the Council of Ministers."

(h) Article 163 provides for a Council of Ministers to aid and advise the Governor in the exercise of his functions makes him the sole and final judge whether any function is to be exercised in his discretion or on the advice of the Council of Ministers. Although Art. 74 also provides for a Council of Ministers to aid and advise the President, that Article does not refer to any discretionary power on the President and as a consequence, there is no provision in Art. 74 corresponding to Art. 163(2) which makes the Governor the sole judge in any matter in which he is required to act in his discretion.

(i) ...

(j) ....

(k) ....

(l) .... "

In proposition (h) above, the distinction between the provisions of Art. 74 and 163(2) has been noticed by the Apex Court and observed :

" Of course, there is some qualitative difference between the position of the President and the Governor. The former, under Article 74 has no discretionary powers; the latter too have none, save in the tiny strips covered by Articles 163(2), 371-A(1)(b) and (d), 371-A(2)(b) and (f), VI Schedule para 9 (2) (and VI Schedule para 18(3), until omitted recently with effect from 21.1.1972). These discretionary powers exist only where expressly spelt out and even these are not left to the sweet will of the Governor but are remote-controlled by the Union Ministry which is answerable to Parliament for those actions. Again a minimal area centering round reports to be despatched under Article 356 may not, in the nature of things, be amenable to ministerial advice. The practice of sending periodical reports to the Union Government is a pre-constitutional one and it is doubtful if a Governor could or should report behind the back of his Ministers. For a centrally appointed constitutional functionary to keep a dossier on his Ministers or to report against them or to take up public stances critical of Government policy settled by the Cabinet or to interfere in the administration directly - these are unconstitutional faux pas and run counter to parliamentary system. In all his constitutional 'function' it is the Ministers who act; only in narrow area specifically marked out for discretionary exercise by the Constitution, he is untrammelled by the State Ministers' acts and advice. Of course, a limited free-wheeling is available regarding choice of Chief Minister and dismissal of the Ministry, as in the English practice adapted to Indian conditions."

80. However, the question which requires consideration in the light of the fact that Article 74(1) provides that there shall be Council of Ministers to aid

and advise the President in the exercise of his functions. Article 163(1) makes the same provision, mutatis mutandis for the Governors. If the correct conclusion to draw from Articles 74(1) and 163(1) is that the President and the Governors are not obliged to accept and act according to that advice, it would follow that in the discharge of their functions, the president and the Governors have a discretion to disregard the advice of the Council of Ministers. But such a conclusion is inconsistent with the express conferment of discretionary power on the Governor under Article 163(2), for, if Governors have a discretion in all matters under Article 163(1), it would be unnecessary to confer on Governors an express power to act in their discretion in a few specified matters. The conferment of specified discretionary powers on the Governor by Article 163(2), but not on the President by Article 74, negatives the view that the President and the Governors have a general discretionary power to act against the advice of the Council of Ministers.

81. In view of the above decision in **Samsher Singh's** (supra) case, the proposition that the Governor is required to act in his discretion only by express provisions, is no longer good law, for, both the judgments (of A.N. Ray, C.J. and Krishna Iyer, J.) ruled that in some cases the Governor had power to act in his discretion

as a matter of necessary implication. Again, the statement that the words "in his discretion" have the technical meaning given to them under the Government of India Act 1935 is also not good law and the Supreme Court gave those words their plain natural meaning; namely, that where the Governor acts "in his discretion", he is not obliged to follow the advice given to him by the Council of Ministers.

82. The Sarkaria Commission was appointed to look into and report on Central-State relations considered, inter alia, the manner in which this power has been exercised over the years and made certain recommendations designed to prevent its misuse. Since the Commission was headed by a distinguished Judge of the Apex Court and also because it made its report after an elaborate and exhaustive study of all relevant aspects, the Apex Court in S.R. Bommai's case (cited supra) observed that the said opinion is certainly entitled to great weight notwithstanding the fact that the report had not been accepted at the relevant time by the Government of India. In para 4.11.25, the said the Commission observed that the Council of Ministers may advise the Governor to dissolve the Legislative Assembly on the ground that it wishes to seek a fresh mandate from the electorate. If the Ministry enjoys a clear majority in the Assembly, the Governor must

accept the advice. However, when the advice of dissolving the Assembly is made by the Ministry which has lost or appears to have lost majority support, the Government should adopt the course of action suggested in paras 4.11.09 to 4.11.13 and 4.11.20 of the said recommendations. Thus from the said recommendations, it would be clear that the Governor must accept the advice of the Ministry enjoying clear majority in the Assembly.

83. At this juncture it will not be out of place to refer to the decision of **P. Joseph John v. State of Travancore Cochin,** A.I.R. 1955 S.C. 160 and on the following observations made therein at page 165 of the report :

> "It is an elementary principle of democratic Government prevailing in England and adopted in our Constitution that the Rajpramukh or the Governor as head of the State is in such matters merely a constitutional head and is bound to accept the advice of his Ministers."

The National Commission constituted to Review the Working of the Constitution, had an occasion to circulate a consultation paper on the Institution of Governor under the Constitution, wherein, the recommendations made by the Sarkaria Commission contained in Chapter IV (relating to Governors) were by and large accepted, subject to certain

suggestions made in the said working paper. One of such recommendations is that so long as the Council of Ministers enjoys the confidence of the Legislative Assembly, the advice of the Council of Ministers in regard to summoning and proroguing a House of the Legislature and in dissolving the Legislative Assembly, if such advice is not patently unconstitutional, should be deemed as binding on the Governor. If the Assembly is to be dissolved and an election can be held early, the Governor should normally ask the outgoing Ministry to continue as a caretaker Government. However, this step would not be proper if the outgoing Ministry has been responsible for serious mal-administration or corruption. A convention should be adopted that a caretaker Government should not take any major policy decisions. Since the Commission to review Constitution was headed by a distinguished former Chief Justice of India and also because it made its report after elaborate and exhaustive study of the working of the Constitution in the past, its recommendations are certainly entitled to great weight, notwithstanding the fact that the report has not yet been accepted by the Government of India. Thus, taking into account the above recommendations and suggestions, one has to consider as to whether the petitioners have made out a prima facie case, so as to call upon the respondents to justify their action. At this juncture, I must make it clear that I am

not recording any findings as to whether a judicial review is available or not. The Constitutional Scheme is looked into only to reach to the conclusion as to whether or not prima facie case is made out by the petitioners warranting determination of issue whether judicial review and/or justiciability of the issue is or is not open?

84. Having examined the historical background and scheme of our Constitution, in that light, let me examine, in the facts and circumstances of these cases; whether the petitioners have made out any prima facie case, warranting judicial review or for that matter justiciability of the issue of dissolution. If yes, to what extent. This question will have to be addressed looking to the pleadings and allegations made in the petitions. Now let me turn to the facts stated in the WP.No.84/2002 (Shri Luizinho Joaquim Faleiro v. State of Goa).

W.P. No.84/2002:

85. The contents of paras 1. 2(i) to (xi) deal with the bare facts and the inferences drawn by the petitioner himself. In para 2(xii), the allegations are that without proper notice to the Members of the Council of Ministers or without following appropriate procedure,

passing resolution of the Council of Ministers, the Chief Minister, in connivance with the Chief Secretary of the State, mis-represented to the Governor that the Council of the Ministers had taken unanimous resolution to recommend to the Governor of Goa to dissolve the Legislative Assembly. Therefore, an attempt made in the petition, appears to be to make out a case that no resolution was ever passed, much less any unanimous resolution was passed. As I further proceed to read petition, para 2 (xiii) makes a factual averment which hardly needs any investigation. Para 3 contains formal allegations; whereas in para 3.(A), the petitioner asserts that the Chief Minister would have had to face a vote of no confidence, as such, he opted for alternative and sought the dissolution of the House and the Governor acted contrary to the well established principles governing dissolution of the Legislative Assembly on the advice of the Council of Ministers which was not likely to continue with the majority. In the subsequent part of this para, an attempt is made to bring on record the alleged instability of the Government and certain news paper reports were sought to be relied upon, which are, admittedly, subsequent to the order of dissolution.

86. In para 3.B., an attempt is made to allege that the Chief Minister did not command the stable

majority and exercise of power on the part of the Governor to dissolve the house almost 2 and half years prior to the expiry of its normal term, was bad and illegal.

87. Then in para 3.C. allegations are that the Leader of Opposition was not granted interview by the Governor and he dissolved the Legislative Assembly on the advice of the Chief Minister and not of the Council of Ministers and in doing so, the Governor acted in undue haste and that the Governor should not have exercised these powers and ought to have refused the dissolution. Then in the rest of the petition, a case is sought to be made out that there was no change in circumstances after convening meeting of the Legislative Assembly for approving the budget. Relying upon the Judgment of the Apex Court in **S.R. Bommai's** case (cited supra), a case is sought to be made out that the Governor should have invited the Leader of Opposition and given him time to prove his majority on the Floor of the House and should have explored the possibility to ensure Constitutional Government in the State. It is further alleged that the Governor was duty bound to protect, preserve and uphold the Constitution. With these pleadings, declaration of invalidity of the order dissolving the State Assembly is prayed for.

W.P. No.88/2002

88. The second petition being WP. No.88/2002 is also directed against the order of the Governor permitting the Chief Minister, Respondent No.3 and his Council of Ministers to continue to carry on their functions. The petitioners in para 3 of this petition tried to make out a case that the advice tendered by the Chief Minister was mala fide in dissolving the Legislative Assembly ahead of more than two years of its tenure. No real and genuine grounds existed on the basis of which an honest opinion could be formed by the Governor to dissolve the Assembly and in fact, the decision of the Governor was vitiated by mala fide considerations. This petition also repeats the same allegations as are made in the earlier petition to the effect that the Governor was bound to follow the constitutional mandate of holding consultation with the Leader of Opposition and ought to have taken into account the newspaper reports and should have taken independent decision to reject the advice tendered by the Chief Minister. An attempt is made to make out a case that the Governor should have consulted individual members of the Council of Ministers to ascertain the veracity of the claim of the Chief Minister and the reasons sought to be given by respondent No.3 that he recommended dissolution in order to seek fresh mandate from the people as he was

having fractured mandate. An attempt is also made to make out a case that even in the absence of judicially discernible standards the Courts have every power to exercise jurisdiction as the policy of the judicial hands off in political matters will not be applicable to the facts of the present cases.

89. The petitioners, relying on the Judgment of **S.R. Bommai** (cited supra) prayed for judicial review and consequently for setting aside the action of the Governor. The petition is mainly based on the aforesaid extracted pleadings. An attempt is made to make out a case that respondent No.3 was expecting a motion of No Confidence and therefore, with mala fide intention to avoid landing in precarious situation, he unilaterally tendered advice to dissolved the Legislative Assembly and in accepting the said advice, without consulting the Lead of Opposition or without providing an opportunity to form an alternate Government, the Governor decision to dissolve the House was with undue haste.

90. The aforesaid pleadings and the total impact thereof, if taken into account, prima facie attempt seems to be to establish that the Chief Minister and the Council of Ministers were likely to face some defection with the result, party in power was to be reduced to insignificant

minority. In order to avoid this situation, the Chief Minister on his own, unilaterally, without there being any decision of the Council of Ministers, advised the Governor of the State to dissolve the House, so as to seal fate of motion of no confidence. In this situation, the assertion is that the Governor should not have accepted the advice and should have made an attempt to give an opportunity to the petitioners, or the Leader of Opposition to form an alternate Government. In not doing so, the Governor acted in undue haste and dissolved the Legislative Assembly without application of mind. These are the bare challenges set up in the petitions, though these petitions were argued on the larger canvass, larger than the scope of respective petition.

91. The aforesaid allegations were replied by all the respondents by filing affidavits. The situation emerging on record therefrom is that the meeting of Council of Ministers did take place at 10.30 a.m. on 27.2.2002. The Chief Secretary of the State himself was present for the said Meeting. In the said meeting, the Council of Ministers resolved to advise the Governor of the State to dissolve the Legislative Assembly. In support of this fact, 21 Affidavits are filed on record, affirmed by the 21 Members of the Legislative Assembly, including that of 13 Members of Council of Ministers (13

Ministers), who, unequivocally said on oath that they were present for the Cabinet Meeting chaired by the Chief Minister of the State (Respondent No.3) and it was unanimously resolved to tender advice to the Governor of the State to dissolve the Legislative Assembly. As against this, there is only one affidavit filed on record affirmed by one Mr. Jose Philip D'Souza, affirmed on 18.3.2002, who had tendered is resignation from the Council of Ministers on 2.3.2002. Thus, looking to the date of his resignation and the date of filing the affidavit, it is not difficult to read as to why he chose to file this affidavit. Further, if his Affidavit is perused, it would be clear that he does not dispute the Cabinet Meeting dated 27.2.2002, but asserts that abruptly it was informed that the meeting has been convened to recommend dissolution of Assembly and some of the Members of the Council strongly objected and that there was no unanimity on the issue and that no decision was taken by the Council of Ministers in the meeting, held on 27.2.2002, to recommend dissolution of the State Legislative Assembly.

92. It is significant to notice that 13 Ministers present in the Cabinet Meeting affirmed on oath that there was a meeting of the Cabinet and unanimous decision was taken in the said meeting and 21 out of Members of the

Legislative Assembly affirmed on oath to stand by the decision taken by the Council of Ministers to dissolve the Legislative Assembly, thus looking to the magic figure of 21 out of 40, can it be said that the Chief Minister was not enjoying majority in the House or the Council of Ministers were not enjoying confidence of the House or that the ruling party had no majority in the house or that looking to the affidavits of all the 13 Ministers who were Members of the Council of Ministers, can it be said that there was no meeting of the Council of Ministers or that no such resolution was adopted in the said meeting. The Affidavit filed by Mr. Jose Philip D'Souza, coming on record after his resignation, speaks volume about the reasons why he is filing such affidavit on record. At any rate, he also does not deny that there was no meeting at all. With this material on record, the assertions made by the petitioners that there was no meeting or that there was no meeting of the Council of Ministers or that the advice tendered by the Chief Minister was his unilateral advice or the Council of Ministers were not enjoying the confidence of the House or majority in the House, must fail.

93. With the above material on record, the picture is clear that respondent No.3, the Chief Minister was enjoying majority of the House and the Council of

Ministers did resolve to recommend dissolution of the House to seek popular mandate as the Government was being run on fractured mandate. Now the question is, when such a advice comes to the Governor of the State, what should be the role of the Governor or how the Government should act or what procedure the Governor should adopt while exercising his power or while accepting advice of the Council of Ministers enjoying majority.

94. Factually, it is brought on record that on receipt of the resolution containing advice of the Council of Ministers, the Governor had verified the factual events which had taken place in the Meeting of the Council of Ministers; deliberations which took place in the said Meeting through the Chief Secretary of the State and appears to have consulted the Advocate General of the State before deciding to accept the advice tendered by the Council of Ministers. In this backdrop, what decision the Governor should have taken, is not a question. The question is, can it be said that the Governor has faulted in accepting the said aid and advice tendered by the Council of Ministers through the Chief Minister ? In this behalf, it would be relevant to refer to the recommendations of the Sarkaria Commission wherein it is specifically mentioned that various Governors have adopted different approaches in similar situations in regard to

dissolution of the Legislative Assembly. However, where the Chief Minister had lost such support, some Governors refused to dissolve the Legislative Assembly on his advice, while others in similar situations, accepted his advice and dissolved the Assembly. The Assembly was dissolved in Kerala (1970) and in Punjab (1971) on the advice of the Chief Minister whose claim to majority support was doubtful. However, in more or less similar circumstances in Punjab (1967), Uttar Pradesh (1968), Madhya Pradesh (1969) and Orissa (1971) the Legislative Assembly was not dissolved. Attempts were made to install alternative Ministry. The opinion expressed by the Sarkaria Commission is that the advice of the Chief Minister enjoying majority is normally binding on the Governor. The recommendation of the Sarkaria Commission in this behalf are as under :

> "4.11.15 The Council of Ministers may advice the Governor to dissolve the Legislative Assembly on the ground that it wishes to seek a fresh mandate from the electorate. <u>If the Ministry enjoys a clear majority in the Assembly, the Governor must accept the advice.</u> However, when the advice for dissolving the Assembly is made by a Ministry which has lost or appears to have lost majority support, the Governor should adopt the course of action suggested in paras 4.11.09 to 4.11.13 and 4.11.20 above as may be appropriate." [emphasis supplied]

The aforesaid recommendation, would clearly establish that

if the Ministry enjoys a clear majority in the Assembly, the Governor must accept the advice and the said recommendation further makes a recommendation in para 4.16.14 reading as under :

> "4.16.14 So long as the Council of Ministers enjoys the confidence of the Legislative Assembly, the advice of the Council of Ministers in regard to summoning and proroguing a House of the Legislature and in dissolving the Legislative Assembly, if such advice is not patently unconstitutional, should be deemed as binding on the Governor." [Emphasis supplied]

Keeping in view the aforesaid recommendations and considering the situations from two different angles, namely that the advice tendered by the Council of Ministers enjoying clear majority in the Assembly, the Governor must accept the advice and he has no discretion, then in that event, this is a case wherein the Chief Minister was enjoying clear majority, which is borne out from the affidavits filed on record affirmed by 21 individual Members of the State Assembly. In this situation, can it be said that any prima facie case is made out to establish that the decision of the Governor was arbitrary or malafide, prima facie answer to it would be obviously, no.

95. Considering the same case from the another

angle that the Governor had a discretion in accepting such advice, then can it be said that the Governor faulted in accepting the said advice. On the historical backdrop of exercise of discretionary powers by the various Governors adopting different approaches in similar situation in regard to the dissolution of the Legislative Assembly, in order to answer this question one has to consider that the "discretion" is the act or the liberty of deciding according to the principles of justice and one's ideas of what is right and proper under the circumstances, without wilfulness or favour, and, as applied as to public functionaries, means the power or right of acting officially, according to what appears just and proper under the circumstances. It must in a legal sense is the responsible exercise of official conscience on all facts of a particular situation in the light of the purpose for which the power exists. The term "discretion" imports exercise of judgment, wisdom and skill, as contradistinguished from unthinking folly, heady violence, and rash injustice. The "discretion' means the equitable decision of what is just under the circumstances. It means the liberty or power of acting, without other control in one's own judgment.

96. Thus, in absence of a hard and fast rule for the establishment of a clearly defined rule, the duty

involves the character of Judgment or discretion which cannot be controlled by mandamus. In the wake of this meaning assigned to the word "discretion" can it be said that the Governor has used his discretion unconstitutionally in the matter of dissolution of the State Legislative Assembly or the said discretion suffers from unthinking folly, heady violence and rash injustice. Can it be said that it is capricious or arbitrary action on the part of the Governor. The discretion may be, and is to a very great extent related by usage or by principles which the authorities or constitutional functionaries have learned by experience, when applied to the great majority of issues, but it is still left to the authorities to determine whether an issue is exactly alike in every colour, circumstances and features to those upon which the usage or principle is founded or in which it has been applied. As already stated hereinabove, various Governors have adopted different approaches in similar situations in regard to dissolution of the Legislative Assembly and in the backdrop of the fact that the advice of a Chief Minister enjoying majority support in the Assembly is normally binding on the Governor, I am of the prima facie opinion that the Governor has exercised his discretion in harmony with the Council of Ministers. Judged from this angle, can it be said that any prima facie case is made out by the petitioners to exercise

powers of review. Can it be said that any case is made out by them so as to say that onus of proof stood shifted on the respondents to justify their action, prima facie answer to it would be obviously, no.

97. At this juncture, one more aspect which needs to be taken into account is that the WP No.84/2002 itself brings on record the earlier defections which have taken place in the recent past on the political horizon of the State, which is clear from the pleadings of the petitioners themselves. In this backdrop, if the Governor felt that having regard to the conditions then prevailing in the State, he should accept the aid and advice tendered by the Council of Ministers and should exercise his discretion in harmony with his Council of Minister to prevent further defections, horse trading or to give an opportunity to the State to have a stable Government in this backdrop, can it be said that any prima facie case is made out to say that onus got shifted on the respondents to justify their action. I think no. On the above canvas of facts and circumstances, can it be said that the decision of the Governor was tainted with mala fides, so as to call upon the Governor to justify his acts. I think no. A large number of decisions of different Courts have been relied on by the petitioners, but none of those Judgments are necessary or relevant for

the present. All those Judgments would have been relevant only for deciding the issue on merits, had the petitioners crossed the first hurdle and would have been successful in shifting onus on the respondents.

CONSIDERATION OF SUBSEQUENT EVENTS :

98. I examined the facts of the present cases on their own merits and have reached to the conclusion that the petitioners failed to make out any case even for prima facie enquiry. I am also of the opinion that the subsequent events are such in nature and dimensions that the case propounded by the petitioners have been completely overshadowed and eclipsed by the said events and the petitions are liable to be dismissed on this count also.

99. The respondents submitted that whenever subsequent events of facts and law which have bearing on the entitlement of the parties to reliefs or on aspects which have bearing on the petitions, the Court is not precluded in taking cautious cognizance of the subsequent changes of fact and law to mould the relief.

100. The petitioners strongly opposed the said move to introduce these subsequent events on record and to

press them into service on the ground that the third Judge is not expected to take fresh material on record which was not before the Division Bench when the petitions were heard and respective judgments were delivered in these Writ Petitions. The submissions advanced on behalf of the petitioners in this behalf need not detain me in view of the fact that the petitioners themselves have moved Misc. Civil Application No.371/2002 seeking production of the material allegedly considered by the Governor while dissolving the Assembly. The objection raised by the petitioners for considering subsequent events is running counter to the conduct of the petitioners themselves. If the petitioners were of the view that no fresh material could be taken on record and were serious in their submissions, then they themselves would not have moved an application seeking production of evidence which is not on record.

FINDINGS ON SUBSEQUENT EVENTS :

101. Now turning to the rival submissions advanced, it is needless to mention that the law on the subject is well settled. The parties to the proceedings cannot be prevented from bringing on record subsequent events having bearing on the issues. In **Lekh Raj v. Muni Lal and others,** (2001) 2 S.C.C., 762, The Apex Court has

observed thus :-

> " 11. The law on the subject is also settled. In case subsequent event or fact having bearing on the issues or relief in a suit or proceeding, which any party seeks to bring on record, the court should not shut its door. All laws and procedures including functioning of courts are all in aid to confer justice on all who knock its door. Courts should interpret the law not in derogation of justice but in its aid. Thus bringing on record subsequent event, which is relevant, should be permitted to be brought on record to render justice to a party. But the Court in doing so should be cautious not to permit it in a routine. It should refuse where a party is doing so to delay the proceedings, harass the other party or doing so for any other ulterior motive. The Courts even before admitting should examine, whether the alleged subsequent event has any material bearing on the issues involved and which would materially affect the result. In Pasupuleti Venkateshwarlu v. Motor & General Traders this Court has very clearly held to the same effect: (SCC pp. 772-73, para 4).
>
> " It is basic to our processual jurisprudence that the right to relief must be judged to exist as on the date a suitor institutes the legal proceeding. Equally clear is the principle that procedure is the handmaid and not the mistress of the judicial process. If a fact, after the lis has come to Court and has a fundamental impact on the right to relief or the manner of moulding it, is brought diligently to the notice of the Tribunal, it cannot blink at it or be blind to events which stultify or render inept the decretal remedy. Equity justifies bending the rules of procedure, where no specific provision or fair play is violated, with a view to promote substantial justice - subject, of course,

to the absence of other disentitling factors or just circumstances. Nor can we contemplate any limitation on this power to take note of updated facts to confine it to the trial court. If the litigation pends, the power exists, absent other special circumstances repelling resort to that course in law or justice. Rulings on this point are legion, even as situations for applications of this equitable rule are myriad. We affirm the proposition that for making the right or remedy claimed by the party just and meaningful as also legally and factually in accord with the current realities, the court can, and in many cases must take cautious cognizance of events and developments subsequent to the institution of proceeding provided the rules of fairness to both sides are scrupulously obeyed. "

12. This Court in Ramesh Kumar v. Kesho Ram held: (SCC pp. 626-27, para 6)

"6. The normal rule is that in any litigation the rights and obligations of the parties are adjudicated upon as they obtain at the commencement of the lis. But this is subject to an exception. Wherever subsequent events of fact or law which have a material bearing on the entitlement of the parties to relief or on aspects which bear on the moulding of the relief occur, the court is not precluded from taking a 'cautious cognizance' of the subsequent changes of fact and law to mould the relief. In Lachmeshwar Prasad Shukul v. Keshwar Lal Chaudhuri Chief Justice Sir Maurice Gwyer observed: (AIR p.6):

'But with regard to the question whether the court is entitled to take into account legislative changes since the decision under appeal was given, I desire to point out that the rule adopted by the Supreme Court of the United States is the same as that which I think commends itself to all three members of this Court. In Patterson v. State of

> Alabama Hughes, C.J., said: " We have frequently held that in the exercise of our appellate jurisdiction we have power not only to correct error in the judgment under review but to make such disposition of the case as justice requires. And in determining what justice does require, the Court is bound to consider any change, either in fact or in law, which has supervened since the judgment was entered. ' " "

Keeping in view the above observations, it is clear that subsequent events having great impact on these petitions can be taken into consideration.

102. Taking into account the aforesaid subsequent events leading to subsequent elections to the Assembly of the State of Goa, consequent upon Notification dated 2.6.02, a new Legislative Assembly for the State came to be constituted and that it has started functioning with its first meeting. There was no challenge to the elections notified on 6.5.02 nor is there any challenge to the Notification dated 11.5.02 issued by the Election Commission of India whereby fresh elections for the constitution of new Assembly were directed. Even there is no challenge to the newly constituted Legislative Assembly of the State. None of the newly elected members of the Legislative Assembly are parties to these petitions. None of them are before this Court. The petitioners are seeking a relief of declaration as prayed, if granted, it will have the effect of reviving the dissolved Assembly

and unseating all the newly elected members of the Legislative Assembly without there being any challenge to their election or to the newly constituted Assembly of the State, that too without affording them any opportunity of hearing. The question is can such a relief be granted in the present petitions resurrecting the dissolved Assembly and thereby putting life in the dissolved Assembly and thereby taking away the vested rights of the newly elected members of the Legislative Assembly ? To my mind, the answer must be in the negative.

103. On the above factual matrix the question with regard to the validity of the proclamation dissolving the Assembly is no longer a live issue. The issues sought to be raised in the petitions have become academic due to subsequent elections to the Assembly giving birth to a newly constituted Legislative Assembly of the State. In absence of any challenge to fresh elections or to the newly constituted Assembly it would be impermissible to issue any such declaration or directions to revive the dissolved Assembly and to reinduct the erstwhile State Government into the office. As a matter of fact, in these petitions, in my view, the petitioners ought to have challenged the Notification dated 11.05.2002 issued by the Election Commissioner of India, declaring general elections for constituting the new Assembly of the State

of Goa, which were scheduled to be held on 30th May, 2002 so as to keep the issue alive. In **Pearelal v. Union of India,** AIR 1975 SC,650 no relief was granted by the Apex Court as orders issued subsequent to the order under challenge, were not challenged by amending the petition. It was, thus, held that the original petition had become infructuous.

104. The fresh elections have taken place during the pendency of these petitions. Legislative Assembly and Ministries have been constituted. The issue involved in the petitions has become academic. Thus in absence of any challenge to the Notification directing fresh elections and further challenge to the constitution of newly constituted Assembly, it will not be possible for this Court to exercise any power under Article 226 to put the clock back.

105. The writ jurisdiction is meant for extraordinary relief and limited by conditions, it is intended to be issued for a definite and fruitful purpose for doing substantial justice. It cannot be issued for a mere declaration of right. The Supreme Court in the case of **Suresh v. Vasant,** A.I.R. 1972 SC 1680 held that while granting relief High Court should keep in view that the issue of writ would not be futile. In **Balmadies**

**Plantations v. State of Tamil Nadu,** AIR 1972 SC 2240, wherein the question of validity of a notice under the Act which had not been brought into force was not examined as the matter was purely academic in nature. In the case of **M. Ismail Faruqui v. Union of India,** A.I.R. 1995 S.C. 605 (P.86), the Apex Court while dealing with the maintainability of the reference refused to answer Reference and returned the same. The observations made in this behalf are reproduced hereinbelow :

> "..... the Reference made under Art. 143(1) becomes superfluous and unnecessary. For this reason, it is unnecessary for us to examine the merits of the submissions made on the maintainability of this Reference. We, accordingly, very respectfully decline to answer the Reference and return the same.

106. As already set out hereinabove, no challenge was set up by amending petitions to the Notification issued by the Election Commission of India holding elections to the General Assembly. Elections have been held to the State Assembly. New Assembly, by virtue of Notification dated 2.06.2002 has been constituted. Newly constituted Assembly is not under challenge. Newly elected members of the Legislative Assembly are not parties to the petitions. Under these circumstances, one has to reach to the conclusion that the issue is not a live issue and has become academic. The same approach was

adopted by the Judges of the Apex Court in the case of S.R. Bommai (supra) though the majority view was that it would be open to this Court to restore the status quo ante to the issuance of the proclamation to restore the Legislative Assembly and Ministry provided the issue is kept burning. As a matter of fact, the State of Rajasthan V/s. Union of India, A.I.R. 1977 S.C. 1361 holds that inspite of disapproval or non-approval does not survive the Legislative Assembly which may have been dissolved but, this aspect has not been dealt with, specially in view of the law declared by the Supreme Court that no such dissolution is permissible before approval off both the Houses. However, in these petitions, dissolution being in exercise of powers under Article 174(2)(b) different consideration would prevail. At any rate because of other vital defects in the petitions, as pointed out hereinabove, it will be futile to issue any writ in exercise of writ jurisdiction of this Court. Thus it follows as a fortiori the validity of the impugned dissolution cannot be examined in these petitions. The petitions must fail.

107. The petitioners having contested the elections to the newly constituted State Legislative Assembly, have caused substantial damage to their petitions. In my view, in view of the acquiescence on the

part of the petitioners by contesting fresh elections, these writ petitions filed by the petitioners are now rendered infructuous and it would be futile to issue any writ at this stage. The Apex Court in the case of **Rajendra Prasad Yadav and ors. v. State of M.P. and ors.,** (1997) 6 SCC 678, adopted the similar approach and refused to issue futile writ. All the petitioners are now elected members to the newly constituted Legislative Assembly. They are enjoying all the privileges in that capacity. They cannot be allowed to blow hot and cold. In this view of the matter, as a matter of propriety, they should not have proceeded to prosecute and/or pursued these petitions any more being responsible Members of the law making fraternity after having become members of the newly constituted Legislative Assembly and should have helped this Court by gracefully withdrawing the petitions, so as to save valuable and precious judicial time. But it appears that the petitioners prosecuted these petitions only to gain political mileage. Practice of using the judicial forums or Courts for political benefits needs to be arrested. In this view of the matter, the petitions need to be dismissed with heavy costs. In the aforesaid premises, I agree with the order passed by my Brother, Hardas, J. that these petitions deserve to be dismissed.

108. I, therefore, make the following Order :

In the result, both the petitions are dismissed with costs quantified in the sum of Rs.25,000/- to be paid by each petitioner. Rule stands discharged in both the petitions.

Before parting with the case, I wish to place my appreciation on record for the assistance rendered to me by all the learned Counsel appearing on behalf of the respective parties to the petitions.

In accordance with the Clause 36 of the Letters Patent, read with Rule 15 of Chapter XVII of the Bombay High Court Appellate Side Rules 1960, these petitions be now placed before the Division Bench for pronouncement of final Judgment or Order disposing of these petitions.

V.C. DAGA, J.

ssm.

CORAM : V.C. DAGA &
P.V. HARDAS, JJ

DATE : 2nd August, 2002.

Per Court :

109. Heard rival contentions. Shri Y.V. Nadkarni, learned counsel appearing for the petitioner in Writ Petition No.84 of 2002, submitted that this matter should be heard by this Division Bench after the receipt of the certified copy of the judgment by the petitioner.

110. It is needless to mention that when the Judgment was delivered by one of us as a Third Judge (Daga, J.), the Judgment was ready and available for perusal of the parties. In this view of the matter, we do not think that the request made is reasonable. Hence, the request is rejected.

111. Shri J. D'Souza, learned counsel appearing for the petitioners in Writ Petition No.88 of 2002, reported no instructions. The statement made by him and information passed on to this Court is taken note of.

112. In view of the majority view, the petitions are dismissed. Rule in both petitions stands discharged. Each petitioner shall bear the costs of the respondents, separately quantified in the sum of Rs.25,000/- (Rupees twenty five thousand only) per petitioner.

V.C. DAGA, J.

P.V. HARDAS, J.

Per Hardas, J:

113. In addition to our above order, I propose to place on record that when these petitions were heard by me with Learned Brother Aguiar J., certain subsequent events, which have taken place such as holding of the elections, declaration of the results thereof and consequent constitution of the new Legislative Assembly of the State were not the subject-matter of consideration as these are subsequent events.

114. In view of the subsequent events, I herewith endorse the views of my Learned Brother Daga J., that the issue is no longer alive and petitions are rendered infructuous in view of the subsequent events and no fruitful purpose would be served by issuing writs as prayed for in the petitions. The petitions are thus liable to be dismissed on this count also. Accordingly, these petitions are dismissed as per the order recorded in the opening part of this Order.

P.V. HARDAS, J.

mc.